87-1555
No. 86-1555

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMICUS CURIAE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
STEPHEN C. YOHAY
GAREN E. DODGE *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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The Equal Employment Advisory Council (EEAC or Council) respectfully submits this brief as amicus curiae in support of the Petitioners. The parties' written consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote sound approaches to the elimination of discriminatory employment practices. Its member-

ship consists of a broad segment of the employer community in the United States, including individual employers as well as several trade associations which themselves have hundreds of corporate members. The members of EEAC are committed firmly to the principles of nondiscrimination and equal opportunity in employment.

The Council's members, and the constituents of its trade association members, are deeply concerned about the problem of drug and alcohol abuse in the nation, and many have implemented programs addressing substance abuse in their workplaces. Often, these programs include drug and alcohol testing, for both applicants and current employees. Many of these programs, in fact, are based on safety concerns similar to those articulated by the Federal Railroad Administration (FRA) as justification for its regulations at issue herein. Many private sector programs, like the FRA rules herein, permit testing of a particular worker for "cause," and also require testing after an accident resulting in death, serious injury or significant property damage.

EEAC has a direct and substantial interest in this case. First, several of its members, as rail operators, are directly affected by the regulations struck down by the Ninth Circuit below. Just as importantly, the testing programs adopted by other EEAC members will be affected by constitutional concepts such as "cause" and "individualized suspicion" at issue herein —even though, as private sector companies, they are not subject directly to the Fourth Amendment's prohibition against unreasonable searches and seizures. For example, several states have enacted legislation barring private sector employers from requiring drug

tests in the absence of some degree of cause,[1] while others permit testing without individualized suspicion for employees who work in high risk or dangerous occupations.[2]

Also, many EEAC members have collective-bargaining relationships with unions which are regulated under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* (1982), and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1982). In many instances, these agreements address the issue of substance abuse testing, and in evaluating the propriety of substance abuse programs under these agreements, arbitrators sometimes rely upon constitutional concepts.[3] Moreover, if the Ninth Circuit's ruling is allowed to stand —including its strained interpretation of "state action" [4]—private employers will unjustifiably be sub-

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[1] *See, e.g.*, Conn. Pub. Act No. 87-551 (1987); Iowa Code § 730.5 (1987); 1987 La. Act 464; Minn. Stat. § 181.95 *et seq.* (1987); Mont. Code § 39-2-304 (1987); R.I. Gen. Laws § 28-6.5-1 (1987); and 1987 Vt. Act § 61.

[2] *See* Conn. Pub. Act No. 87-551 (requiring employers to have "reasonable suspicion" in order to test most workers, but permitting random testing for employees who serve in an occupation which has been "designated as a high-risk or safety sensitive occupation"); Minn. Stat. § 181.950, *et seq.* (random testing permitted for "safety sensitive positions"); Mont. Code § 39-2-304 (testing permitted for applicants in "hazardous work environments").

[3] *See, e.g., Shell Oil Co. v. Oil, Chemical and Atomic Workers International Union*, 84 LA 562, 565 (BNA) (1985); *Texas Utilities Generating Co.*, 82 LA 6 (BNA) (1983).

[4] The Ninth Circuit ruled that the Fourth Amendment "applies to drug tests conducted at the instigation of the railroads

ject to the Fourth Amendment whenever the federal government even "encourages" drug tests by private employers. In fact, in *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co*, 838 F.2d 1087, *cert. filed* (No. 87-1631) (April 1, 1988), the Ninth Circuit recently read Fourth Amendment privacy protections into a union's relationship with its private sector employer without any action by the federal government whatsoever.[5] Accordingly, EEAC

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adopted by the FRA." *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 579. In doing so, the court ruled, in part, that "the federal government's role in promulgating the regulations in question is sufficient government action to subject the tests to the limitations of the fourth amendment." *Id.* The court explained that even "mere encouragement" of a search by the federal government triggered state action. *Id.* at 581.

Such a concept presents serious and far-reaching potential implications. For example, an amendment that would prohibit federal funds from being expended in any workplace which is not free from the illegal use of controlled substances was approved on May 17, 1988, by the House of Representatives. The amendment was offered by Representative Robert Walker (R-PA) to H.R. 4567, 100th Cong., 2d Sess. (1988), to the Energy and Water Appropriations bill. Another bill, H.R. 4717, 100th Cong., 2d Sess. (1988), passed the House Government Operations Committee on June 29, 1988. It requires federal contractors to certify that they are providing drug-free workplaces. It is likely that the Ninth Circuit's version of "state action" would be triggered under these two amendments, subjecting all employers who receive federal funds under one of the covered programs to the Fourth Amendment.

[5] *Burlington Northern*, 838 F.2d 1087, is currently on a petition for a writ of certiorari with this Court (No. 87-1631). In its decision, the Ninth Circuit, unexplainably, "decline[d] to assume that [the union] implicitly granted [Burlington] the authority to invade their privacy in ways the government could not." *Id.* at 1092.

has a substantial interest in this Court's inquiry into whether an employer must have "individualized suspicion" in order to test those employees who present grave safety risks to themselves and others, as well as what kinds of safety risks, if any, can justify testing after an accident or major rule violation.

Because of its interest in the issues associated with substance abuse, EEAC, through a closely related foundation funded by its members, sponsored the preparation of a monograph titled *Drug and Alcohol Abuse: A Guide to the Issues*, by J. Michael Walsh, Ph.D. and Stephen C. Yohay, published in 1987 by the National Foundation for the Study of Equal Employment Policy. In addition, EEAC filed an amicus curiae brief in *National Treasury Employees Union v. Von Raab*, No. 86-1879 (a companion case to the instant case), as well as an amicus brief in support of the Petition for a Writ of Certiorari in *Burlington Northern Railroad Co. v. Brotherhood of Locomotive Engineers, supra.* More generally, as a broadly-based national organization, EEAC has filed many amicus briefs with this Court. Some of these cases include *Watson v. Fort Worth Bank & Trust*, —— S. Ct. —— (No. 86-6139); *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

STATEMENT OF THE CASE

The Federal Railroad Administration (FRA), after a two-year investigation and comment period, promulgated extensive regulations designed "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." 49 C.F.R. § 219.1(a). Recognizing that

there had been 34 fatalities, 66 injuries and over $28 million in property damage in the period between 1975 and 1983, 49 Fed. Reg. 24254 (June 12, 1984), the FRA decided that its regulations should address the drug and alcohol problem in two ways. Subpart C of its regulations, accordingly, requires railroads to test employees who are directly involved in a "major train accident"—one involving a fatality, $500,000 damage to railroad property, or the release of hazardous materials; an "impact accident"—one involving a reportable injury or damage to railroad property of $50,000; or an accident that involves a fatality to a co-worker. Subpart D, on the other hand, authorizes (but does not require) railroads to give tests whenever a supervisor, after a reportable accident, has reasonable suspicion that an employee contributed to the occurrence or severity of an accident; or when railroad rules—such as failure to stop or excessive speeding—are violated.[5]

The Railway Labor Executives' Association (RLEA) brought suit, seeking to enjoin the implementation of the FRA's regulations. The district court, in an opinion from the bench, granted the government's motion for summary judgment. The Ninth Circuit reversed, however, ruling that the FRA's rules improperly permitted unreasonable searches and seizures in violation of the Fourth Amendment. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 587-589 (9th Cir. 1988). In doing so, the Ninth Circuit cited the standard established by this Court

[5] Subparts C and D contain other drug testing provisions that were not struck down by the Ninth Circuit. Those provisions are not at issue in this case and are not addressed in this brief.

in *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987), that a search must be justified both at its inception and in its scope. The Ninth Circuit held that a drug test would not be justified at its *inception* because the rules did not have a "individualized suspicion" requirement: "Accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." 839 F.2d 575 at 587. The court then stated in *dicta* that even if the tests were reasonable at their inception, they still are not reasonable in *scope* because the "tests cannot measure current drug intoxication or degree of impairment." *Id.* at 588.

In a dissenting opinion, however, Judge Alarcon took issue with the majority's reasoning. Noting that drug usage among railroad workers has been implicated in numerous deaths, injuries and damage, and that the majority failed to properly balance the government's interests along with those of the railroad employees, Judge Alarcon indicated that he would hold that the FRA's rule is "justified at the inception." He reasoned:

> I would hold that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests. As recent history attests, locomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands. The threat imposed by drug or alcohol impaired railroad workers transporting hazardous materials across this nation is *far* graver than the potential danger presented by

> the customs the officers . . . the prison guards . . . or . . . the transportation workers in [other cases].

Id. at 569 (emphasis in original). In addition, he stated that the tests can be performed "in the absence of individualized suspicion," that they are not excessively intrusive, and that they are "reasonably work-related to the objective of determining whether railroad workers are intoxicated on the job." *Id.* at 596-98.[7]

SUMMARY OF ARGUMENT

In *O'Connor v. Ortega*, 107 S. Ct. 1492, 1503 (1987), the Supreme Court held that a search of an employee by an employer subject to the Fourth Amendment must be both reasonable at its "inception" and reasonable in its "scope." This Court should hold that a drug and alcohol testing program, like the one adopted in the FRA in its regulations herein, can be reasonable at its "inception" even if supervisors do not have "individualized suspicion" that a particular employee caused a workplace accident. Such a holding is justified herein because railroad companies have a "work-related" purpose to administer post-accident tests—to maintain "supervision, control and the efficient operation of the workplace." *Id.* at 1499.

In addition, such a testing program is reasonable at inception because statistics reveal significant on-the-job substance use and impairment among rail employees, such that there is reason to believe that a post-accident test will "turn up evidence . . . of work-

[7] This brief does not address the issue of whether taking of the urine, or its examination, constitute a "search or seizure."

related misconduct." *Id.* Statistics cited during the FRA's rulemaking, in fact, noted that 23% of all operating personnel were problem drinkers, and that one out of eight rail workers drank while on duty during the study year. 48 Fed. Reg. 30724 (1983).

Moreover, this Court in *O'Connor* left open the possibility that other types of searches—besides "work-related" searches and "investigations of misconduct" —would be permitted under a lessened standard, one that does not require individualized suspicion. *Id.* at 1503. The *amicus* submits that this case, which presents grave safety risks to co-workers and members of the public, presents an opportunity to recognize such a lessened standard. Several courts of appeals, in fact, have ruled that strong safety considerations permit certain employers to administer periodic or post-accident tests. Two such courts of appeals' decisions have even involved employers in the transportation industry under facts that are close to the ones presented herein. *See Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *cert. filed* (No. 87-1706) (April 15, 1988); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

In addition to being reasonable in their inception, the FRA's rules are reasonable in their "scope." First, the FRA's rules are "reasonably related to the objectives of the search," *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)—that is, they seek in part, to deter train operators from drinking or taking drugs while on duty. Significantly, other means of alcohol and drug detection—such as background investigations and supervisor observation of workplace performance—will not be as effective as FRA's testing program. Second, the FRA rules not not "excessively

intrusive," *id.*, a point conceded by the Ninth Circuit below, because the intrusiveness of the actual tests themselves have "been reduced as much as practicable." 839 F.2d at 589.

ARGUMENT

POST-ACCIDENT DRUG TESTING BY AN EMPLOYER IN A SAFETY SENSITIVE INDUSTRY NEED NOT BE PRECEDED BY INDIVIDUALIZED SUSPICION OF EACH EMPLOYEE TESTED IN ORDER TO BE "REASONABLE" WITHIN THE MEANING OF THE FOURTH AMENDMENT

I. To Be Lawful Under the Fourth Amendment, An Employer's Program Need Only Be Reasonable At Its Inception And In Its Scope

The Fourth Amendment requires searches by an employer subject to the Fourth Amendment to be "reasonable." This Court has ruled that to determine whether a search is reasonable requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983); *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967). In the workplace context, the seminal case of *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987) (plurality opinion) made clear that this balancing must include the weighing of "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Id.* at 1499. In *O'Connor*, this Court went on to hold that:

> *public employer intrusions* on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, *should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable.*"

Id. at 1502-03 (emphasis supplied).

This two-fold inquiry, "reasonable at inception" and "reasonable in scope," therefore, serves as the starting point for determining the legality of the FRA's drug testing rules. As we show below, because of the FRA's need to maintain "supervision, control and the efficient operation of [its] workplace," *id.* at 1499, its rules are reasonable under both grounds—and this Court should hold that an employer need not always have "individualized" suspicion in order to meet that standard.

II. Because Of The Strong Safety Concerns Present In Some Occupations—Like The Railroad Industry—It Can Be "Reasonable At Inception" For An Employer To Institute A Post-Accident Drug Test Without Having Individualized Suspicion

In *O'Connor*, this Court explained at least two ways in which a search can be "justified at its inception": there either can be "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of *work-related misconduct*, or that the search is necessary for a noninvestigatory *work related purpose*." 107 S.Ct. at 1503 (emphasis supplied). The Ninth Circuit below, however, made a fundamental mistake in its legal analysis. It recognized only one of the two possible justifications discussed in *O'Connor*, "reasonable grounds

for suspecting that the search will turn up the evidence sought." 839 F.2d at 587. Had the Ninth Circuit recognized (and properly discussed) the possibility that railway companies have a "noninvestigative work-related purpose" in administering certain drug tests, this case likely would have led to a different conclusion.

Under that neglected standard, it is obvious that railroads have a "work related purpose" in ferreting out (and deterring) drug use by their workers. As Justice Alarcon stated in his dissent:

> Drug usage among railroad personnel has been implicated as a potential cause of numerous train accidents which resulted in injury and death. Two such accidents are noted in the companion cases to this matter, *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 838 F.2d 1087. These accidents caused seven deaths and over $3 million in property damage. These tragic events were not isolated incidents. They are two examples of a long line of alcohol or drug-related tragedies. *See generally* T. Manello & F. Seaman, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads* . . . The threat posed by alcohol and drug-related railroad accidents is particularly dangerous in light of the fact that extremely hazardous materials are often transported by rail . . . *Railroad Accident Report—Derailment of Illinois Central Gulf Railroad Freight Train Extra 9629 East (GS-2-28) and Release of Hazardous Materials at Livingston, Louisiana, September 28, 1982* (1983) (describing an alcohol-implicated train wreck which resulted in a chemical spill requiring the evacuation of a community of 3000 persons for a period of two weeks.

839 F.2d at 594. An employer clearly has a "work related purpose" to test employees for drug use, not necessarily to investigate and penalize particular workers, but to deter and prevent further injury and destruction of property.

Moreover, the Ninth Circuit erred in discussing the one standard that it recognized, "reasonable grounds" to believe railroad companies will "turn up evidence" of drug or alcohol use. Comments during the FRA's rulemaking "confirmed that alcohol and drug use does occur on the railroads with unacceptable frequency, despite existing rules and programs." 49 Fed. Reg. 24253 (June 12, 1984). The statistics from a 1979 study, in fact, are truly shocking. They reveal that:

> "19% of all employees were 'problem drinkers' "; "23% of operating personnel were 'problem drinkers' "; . . . [o]nly 4% of problem drinkers were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures"; "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year (1978)"; "13% of workers reported to work at least 'a little drunk' one or more times during that period"; "13% of operating employees drank while on duty at least once during the study year, averaging about 3 such instances during the year"; and "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year."

Petition for a Writ of Certiorari at 3 n.1, citing 48 Fed. Reg. 30724 (1983).[8] On a more down to earth

[8] These numbers reflect the pervasive drug use in the nation in general, and the workplace specifically. For example, the

level, the brakeman involved in the January 4, 1987 Conrail accident near Chase, Maryland testified that he used marijuana with his co-workers "probably" more than ten times (and "maybe" more than 20 times) during 1986 alone. See Brief Amicus Curiae of Thomas Colley, *et al.*, in support of Petition for Certiorari (Colley Brief) at 6. Accordingly, these statistics reveal that there is reasonable grounds to believe that post-accident tests given pursuant to the FRA's rules will "turn up evidence" of drug or alcohol use, a clear justification to test under *O'Connor*.

Even more important than these two exceptions, this Court in *O'Connor* stated that there are a plethora of "other types of employer intrusions"— besides

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1985 National Household Survey on Drug Abuse compiled by the National Institute on Drug Abuse (NIDA) reports that 19% of all Americans over twelve years of age have used an illicit drug in the last year. *1985 National Household Survey on Drug Abuse*, NIDA Capsule, National Institute on Drug Abuse (October, 1986), *cited in Notice Of Proposed Rulemaking*, FAA Anti-Drug Program, 53 Fed. Reg. 8368 (March 14, 1988). Particularly alarming for employers are data indicating that in the 20-40 year old population—those currently entering the workforce—65 percent have used illicit drugs, and 42 percent of those studied have done so within the last year. Among employed 20-40 year olds, 29% reported use of an illicit drug in the past year, and 19% reported some illicit drug use at least once in the past month. *Id.*

In fact, in a poll conducted by a Cocaine National Help Line in New Jersey, 75 percent of 227 drug users admitted to using illegal drugs *on the job*; 61 percent said that the drugs interfered with their work performance; 44 percent stated that they *sold* drugs to other employees; 18 percent admitted to having had a drug related accident; and 18 percent admitted that they had *stolen* from their employers to support their drug habits.

the "work-related searches" and "investigation of workplace misconduct" directly involved in that case —in which employers should be permitted to search. *Id.* at 1501. Significantly, the Court implied that some of these searches should be under an even lesser standard, not necessarily one requiring "individualized suspicion." *Id.* at 1503. This case, which presents grave safety concerns,[9] presents such a situation.

Indeed, several reasoned courts of appeals' decisions recognize the need for employers to be able to test for safety reasons absent individualized suspicion. In *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), a case that involves safety issues in the transportation industry, a bus drivers' union challenged the requirement that employees submit to a "blood and urine test when they are involved in 'any serious accident.'" *Id.* at 1266. The Seventh Circuit, reasoning that the employer had a "paramount interest in protecting the public," found the tests to be constitutional: "Certainly the public interest in the safety of mass transit

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[9] A rule permitting drug screens absent individualized suspicion is especially appropriate in the instant case. First, the railroad companies herein are not acting in a "law enforcement" capacity when they give a drug test. Rather, the railroads (like many of EEAC's members) are acting as "employers"; they are seeking to maintain "supervision, control and the efficient operation of the workplace." *O'Connor* at 1499. And, as this Court made clear, outside the "law enforcement" context, traditional "'probable-cause requirement[s become] impracticable" for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct. *Id.* at 1501, citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Id.* at 1267.

In another transportation case, *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), the District of Columbia imposed a mandatory testing program in response to "repeated incidents of bizarre or dangerous drug-related behavior by [bus] drivers and attendants while on duty." *Id.* at 336. The D.C. Circuit, while recognizing that the tests intrude heavily upon the employees' privacy interests, nonetheless noted that those interests "can be outweighed only by strong governmental concerns." *Id.* at 340. Stressing the "*serious* safety concerns" *id.* (emphasis in original) by the government employer, the court held that the employer "acted pursuant to a significant and compelling governmental interest" as follows:

> There can be no doubt whatsoever that *the School System's mission of safely transporting handicapped children to and from school cannot be ensured if employees in the Transportation Branch are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous.* The case law on this point is clear that a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or of others.

Id. (emphasis supplied), *citing Allen v. City of Marietta*, 601 F.Supp. 482 (N.D. Ga. 1985) (mandatory drug tests permitted for workers around high-voltage wires in view of reports of drug use). *A fortiori*, it is "preposterous" for the RLEA to suggest that individualized suspicion should be required where even more compelling safety concerns—tremendous property damage, injury and loss of life—

are presented by a train accident under the facts herein.

Other cases reject an "individualized suspicion" requirement in light of strong safety concerns. *NTEU v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, a case that is noted as addressing primarily the Customs Service's need to preserve the integrity of its interdiction operations, also addressed *safety* concerns. The court noted that "those employees involved in field operations, particularly if carrying firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use." *Id.* at 178. The court went on to state that the following factors, among others, made Customs' program reasonable: 1) that Customs attempted to minimize the intrusiveness of the search; 2) that Customs has a demonstrated need for its program given their pernicious impact of drugs on society; 3) that the sample is taken in the most private facility practicable; 4) that Customs has responsibilities as an "employer of private citizens"; 5) that less-intrusive measures were considered; and 6) that Customs' program is effective, primarily because drug users may choose not to seek sensitive positions. *Id.* at 177-180.

Similarly, in *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), the Iowa Department of Corrections required correctional officers to submit to urine, blood and breath testing at the request of Department officials. The Eighth Circuit, finding that the Department had a compelling need to determine "whether corrections employees are using or abusing drugs which would affect their ability to safely perform their work within the prison," *id.* at 1308, held that

"urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons." *Id.* *See Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (upholding testing of nuclear power plant employees); *National Ass'n of Air Traffic Specialists v. Dole*, No. A97-073, unpublished slip op. (D.C. Alaska, March 27, 1987) (upholding testing of flight service specialists), cited in *Lovvorn v. City of Chattanooga*, 46 EPD ¶ 37,972 (6th Cir. 1988).[10]

As a result, this Court should adopt the rule that, given the serious safety risks posed by workplace drug abuse, it can be reasonable "at inception" for

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[10] As an example of poor reasoning—with potentially devastating consequences—the Sixth Circuit in *Lovvorn* struck down the city's testing of fire fighters because the potential harm to society would not be "catastrophic." *Id.* at 52,069. The court, in adopting a so-called "continuum of employment categories" analysis, reasoned:

> In the case of fire fighters, the harm to society of a fire fighter being impaired may be significant. Furthermore, those losses, especially when it is in the form of lost lives, are irretrievable. Nevertheless, it would appear that the likelihood of enormous losses being imposed on society because of an impaired fire fighter is significantly lower than with impaired air traffic controllers and nuclear plant employees who literally hold thousands of lives in their hands every day. That does not describe the typical day of a fire fighter.

Id. (citations omitted). Judge Guy, in dissenting from such an ill-conceived analysis, stated it correctly. "There is no right, constitutional or otherwise, to be impaired for duty or to engage in illegal usage." *Id.* at 52,081.

an employer to institute a drug testing program without necessarily having individualized suspicion.[11]

III. Because The FRA's Rules Are Reasonably Related To Their Objectives, And Not Excessively Intrusive, They Are "Reasonable In Scope"

As this Court stated in *O'Connor*, "[t]he search will be permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'" 107 S. Ct. at 1503, citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

First, in finding that the FRA rule was not reasonable in scope, the Ninth Circuit noted that the FRA did not choose the "least intrusive" means of

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[11] Such a rationale, in fact, serves as the impetus behind the approach recently taken by the Department of Transportation for the testing of other private sector employees subject to its regulation. For example, the Federal Aviation Administration, in its Notice of Proposed Rulemaking, 53 Fed. Reg. 8368 (March 14, 1988), stated that it intends to permit random screens for employees in "sensitive safety- and security-related jobs." *See American Federation of Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987). In addition, several states that have chosen to regulate workplace drug testing have adopted such an approach. For example, Connecticut requires employers to have "reasonable suspicion" in order to test most workers, but permits random testing for employees who serve in an occupation which has been "designated as a high-risk or safety sensitive occupation." Conn. Pub. Act No. 87-551 (1987). See Minn. Stat. § 181.950, *et seq.* (random testing permitted for "safety sensitive positions"); Mont. Code § 39-2-304 (testing permitted for applicants in "hazardous work environments").

drug detection. *Id.* at 589. The court reasoned that an "individualized suspicion" requirement would render the drug procedure the "least intrusive" means of drug detection, and that the program thus will serve "reasonably well" to prevent on-the-job use of alcohol and drugs. 839 F.2d at 589.

Amicus submits that employers should not have to reply upon the "least intrusive" means of detecting drug use, or one that works "reasonably well," particularly where serious safety concerns are involved. For example, supervisor monitoring—a less intrusive means of detecting drug use—proved insufficient to prevent the train accident on January 4, 1987 near Chase, Maryland, involving a Conrail train driven by Ricky L. Gates. See Colley Brief. As the Fifth Circuit in *Von Raab* made clear, drug use is not always easy to detect just through supervisor monitoring:

> Alternative sources of information do not eliminate the need for urine testing. Although the Service has had an opportunity to observe the performance of employees while they were working in non-sensitive positions, this provides scant basis on which to evaluate their integrity and reliability should they be assigned to work in sensitive positions.

816 F.2d at 180. *See Mullholland v. Department of the Army*, 660 F. Supp. 1565, 1569 (E.D. Va. 1987) (observation "provides little basis on which to assess their drug-free reputation and reliability of applicants for sensitive positions").

Neither is it effective simply to conduct background investigations of train operators. Interviewees may be "reluctant to disclose their knowledge of the employee's drug use or may be unaware of his use,

either because the employee has not disclosed this activity or because he has submitted names of only those references who do not know of his use." 816 F.2d at 180. Moreover, "background investigations are themselves intrusive invasions of an individual's privacy." *Id.* In fact, background investigations are less desirable as a means of detection because of the possibility of damage to an employee's reputation where questions are raised about potential drug usage.

Second, the Ninth Circuit made a fundamental error in ruling that the FRA rule was not reasonable in scope: the court shifted the focus of the inquiry into whether the tests detect "current drug intoxication or degree of impairment." 839 F.2d at 588-89. Whether an employee is actually physiologically impaired at the moment a urine or blood sample is taken is not the only point of drug testing because on-the-job impairment is only *one* of the problems presented by the employee who abuses drugs. As stated in the monograph *Drug and Alcohol Abuse in the Workplace*:

> The sociopathy (drug seeking, drug dealing, drug using, etc.) associated with drug abuse can have serious adverse effects on job performance, teamwork, cohesiveness of the workforce, and morale. The various legal, financial, ethical, and moral issues that are involved place considerable pressure on the substance abuser. Avoiding detection, generating sufficient funds to purchase drugs, and associating with other substance abusers for support and approval are activities which consume a considerable portion of a substance abuser's day.

Id. at 22. Given such impulses, "drug abuse should be viewed as a kind of 'infectious' disorder, in that it can be spread rapidly through the workforce by employees who are known to be using drugs," *id.* Clearly, the Ninth Circuit misapprehends the true nature of "substance abuse" and its infectious tendencies—an infection that has spread throughout the rail industry, and which the FRA rules seek to eliminate.

Indeed, detecting current impairment is not the sole objective of the FRA regulations. Rather, the FRA rules are designed to deter drug and alcohol possession, use and intoxication, as well as deterring employees from working while under the influence. 49 C.F.R. § 219.101. See 839 F.2d at 587. Obviously, when these deterrence objectives are properly brought into the inquiry, it becomes clear that the FRA post-accident testing rules are reasonably related to their objectives.

Such a deterrence objective is not a "flaw" in the FRA's program, as the Ninth Circuit is wont to call it. 839 F.2d at 588. Rather, deterrence is the *essence* of the program. If employees know they may be detected, they are less likely to operate a train while drinking or using drugs. For a job that involves extreme safety risks and dangers, it should be sufficient to keep someone from working who tests positive for drugs after an accident or major rule violation, even if, *arguendo*, such a positive result is merely an indication that the operator has used drugs "somewhere in the recent past." For the use of drugs in the recent past is an indication of that worker's propensity to use drugs in the *future*—a gamble railroads and other safety sensitive employers should not be forced to make. Had Ricky Gates' propensity to use drugs and alcohol been uncovered earlier—perhaps after a rule violation—a major train accident could have been avoided.[12]

The Ninth Circuit clearly failed to recognize the need for deterrence of drug use in a safety sensitive occupation. This Court, therefore, should hold that FRA's drug testing regulations were reasonable at their inception and reasonable in their scope, and that an employer need not necessarily have "individualized suspicion" for its program to be reasonable.

CONCLUSION

For these reasons, and those expressed by the Petitioner, EEAC respectfully submits that the decision of the Ninth Circuit below should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
STEPHEN C. YOHAY
GAREN E. DODGE *
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment
Advisory Council

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* Counsel of Record

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[12] In addition, the FRA's rules are not excessively intrusive. The Ninth Circuit majority, in fact, conceded that the "manner of conducting the tests is generally reasonable in that they are performed in medical facilities," and that the "intrusiveness of the process of urine testing has been reduced as much as practicable in that only personnel of the medical facility may supervise the sample collection." 839 F.2d at 589.